IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 292.

FLOYD G. AFFOLDER,

Petitioner,

vs.

NEW YORK, CHICAGO & ST. LOUIS RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S BRIEF IN REPLY TO BRIEF FOR RESPONDENT.

MARK D. EAGLETON,
8746 Crandall Square,
St. Louis 5, Missouri,
WILLIAM H. ALLEN,
408 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 6417.

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Cases Cited.

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I.

On the Issue of Proximate Cause.

In the "Brief for Respondent" it is contended (pp. 7, 11-16) that "a case was not made for the jury on the issue of causation"; that is to say that, if there was a violation by defendant of the coupler provision of the Safety Appliance Act, there is no evidence to warrant a finding of a

causal connection between such statutory violation and petitioner's injury. This contention, which was put forth by respondent both in the District Court and in the Court of Appeals and by each court decided adversely to it, is, we submit, plainly without merit. That portion of the opinion of the District Court relating to this matter appears in 79 Fed. Supp., l. c. 370-373, and on pages 184-189 of the record, while that portion of the opinion of the Court of Appeals dealing with the same matter appears in 174 Fed. (2d), l. c. 492, 493, and on pages 212 and 213 of the record.

There is no dispute as to how plaintiff's injuries came about. When the Pennsylvania car was sent down the eastbound main the coupling did not "make" between it and the Rock Island car (R. 55), though the evidence showed that the knuckle of the coupler on the east end of the Pennsylvania car had been opened (R. 43) and the coupler put in good, normal operating condition (R. 52), and that the car was kicked down against the Rock Island car hard enough that it should have joined onto that car (R. 45). Because of such failure of the cars to couple automatically by impact a separation occurred between the Rock Island car and the Pennsylvania car, and the Rock Island car and the cars east of it began to roll down hill toward the east. Plaintiff, observing this movement, ran and undertook to get on the Rock Island car in order to set the brake. When he was about two feet away from the car. running toward it, he stepped on an object that rolled with him, causing him to fall toward the car. He attempted to grab the ladder, but his hand slipped and he fell between the cars (R. 24, 33). He testified that it was his duty to undertake to stop the moving cars (R. 36); that he had received instructions from his superior officers with reference to a situation of that kind; that he should stop any cars that were rolling down at the other end of

the yard, that he should apply brakes on any cars that were rolling down at the other end of the yard (R. 38, 39).

Respondent's contention that no causal connection was shown between the violation of the statute and plaintiff's injury and the arguments advanced by respondent in support thereof obviously overlook the fact that the Employers' Liability Act (45 U. S. C. A., Sec. 51) makes interstate carriers by railroad liable for injury to or death of an employee "**resulting in whole or in part**" from the failure to equip its cars with couplers coupling automatically by impact and to maintain such couplers at all times in efficient working condition, as required by the Safety Appliance Act; that upon proof of a violation of the Safety Appliance Act recovery may be had if the evidence, when viewed in the light most favorable to the plaintiff, tends to show that such violation **either caused or contributed to cause the injury.**

Respondent's argument that no causal connection appeared between the violation of the statute and the injury because petitioner was neither actually engaged in using the appliance when injured nor injured by **the very car movement in which the coupler failed to couple automatically by impact,** is, we submit, utterly unsound. The evidence plainly showed that the runaway movement which plaintiff was endeavoring to stop when injured was **directly caused by the prior failure of the car to couple automatically on impact.** The fact that other cars were sent down this eastbound main after the Rock Island car and the Pennsylvania car had failed to couple by impact did not make prior failure of the couplers to couple automatically by impact any the less a proximate cause of Affolder's injury. Absent such failure, there would have been no separation of the cars and consequently no injury to plaintiff, no matter how many cars might have been shunted into this track.

The evidence, indeed, shows a direct causal connection between the failure of the couplers to couple automatically by impact and plaintiff's injury; a train of events leading, by unbroken sequence, from the failure of the couplers to function efficiently to plaintiff's injury.

After referring to the case of Carter v. Atlantic & St. Andrews R. Co. (5 Cir.), 170 F. 2d 219, now pending on certiorari in this Court (336 U. S. 935), respondent argues that in both the instant case and the Carter case the failure of the cars to couple automatically by impact was not the proximate cause of the accident and resulting injury **but merely created an incidental situation in which the accident otherwise caused resulted in such injury.**

The facts of the Carter case are unlike those here present. In our humble judgment the ruling in the Carter case is wrong and the fact that this Court has issued its writ of certiorari to review the case robs the opinion of the Court of Appeals therein of any authoritative value.

Furthermore, respondent's argument in this connection is directly refuted by the recent decision of this Court in **Coray v. Southern Pacific Co.**, 335 U. S. 520, 69 S. Ct. 275. In the Coray Case the action was brought in the Utah Supreme Court under the Federal Safety Appliance and Federal Employers' Liability Acts to recover for the death of an employee of the respondent railroad, whose death occurred when a one-man flat top motor car crashed into the back end of a freight train on respondent's main line. Both the train and the motor car were being operated eastwardly, the motor car being several hundred feet behind the freight train. The train suddenly stopped because the air in its brake lines escaped, thereby locking the brakes, this being due to a violation of the Safety Appliance Act. The decedent, who was in control of the motor car, did not apply the brakes thereof when the train stopped because

he and another employee with him were looking backward toward a block signal.

The Supreme Court of Utah thought that the defective equipment did not cause or contribute to cause decedent's death; that the stopping of the train **merely created a condition upon which the negligence of the decedent operated.** This Court summarily disposed of that matter in the following language:

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. **Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose.** The statute declares that railroads shall be responsible for their employees' deaths **'resulting in whole or in part'** from defective appliances such as were here maintained. 45 U. S. C., Sec. 51; 45 U. S. C. A., Sec. 51. And to make its purpose crystal clear, Congress has also provided that 'no such employee * * * shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the * * * death of such employee.' 45 U. S. C., Sec. 53; 45 U. S. C. A., Sec. 53. Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages. These air-brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a motor track car following at about the same rate of speed and operated by an employee looking in another direction crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances." (Emphasis ours.)

Among the many cases cited by the Court of Appeals in support of its ruling that the issue of proximate cause was one for the jury (New York, Chicago & St. Louis R. Co. v. Affolder, 174 F. 2d, l. c. 492, 493) (R. 213), are: **New York Central R. Co. v. Brown** (6 Cir.), 63 F. 2d 657; **Erie R. Co. v. Caldwell** (6 Cir.), 264 F. 947, and **McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co.**, 324 Mo. 1005, 25 S. W. 2d 791. We refer to them because in each the issue of proximate cause was ruled upon a state of facts legally similar to that here involved.

In the **Brown Case** (63 F. 2d 657) a car broke loose from a train on a grade, due to a defective coupling, and started moving toward a tunnel. The plaintiff, a brakeman, standing nearby, undertook to board the car to set the brake and stop it. While attempting to ascend the ladder at the side of the car his head hit an electric overhead rail which shocked him and caused him to fall and sustain injuries. He recovered a verdict and judgment below. On appeal the defendant contended that it appeared as a matter of law that a defective coupler was not the proximate cause of the injury. The Court said that it had long been settled that "the chain of causation is not broken by an intervening act which is a normal reaction to the stimulus of a situation created by negligence"; and that there was substantial evidence upon which to submit the cause to the jury upon the issue of proximate cause.

In his excellent opinion, to which we have referred above, the trial judge, in considering the Brown Case, very pertinently said:

> "In principle we can see little difference between the plaintiff in this case and the plaintiff in the Brown case. Each was injured by a fall before he reached the point where his efforts would become effective in the performance of his duty in stopping the moving

car. One before he had boarded the car and the other afterwards" (R. 188). Affolder v. New York, Chicago & St. Louis R. Co., 79 F. Supp. 365, l. c. 372.

In **Erie Railroad Co. v. Caldwell** (6 Cir.), 264 F. 947, a train became separated in switch yards because of a defective drawbar, and the detached cars began to move down grade. The plaintiff, a member of the switching crew, who was standing some forty feet away, observed the separation and movement and, for the purpose of preventing the cars from colliding with an obstruction, boarded one of them for the purpose of setting the brake. While so engaged a collision occurred and the plaintiff was injured. A judgment in his favor based on a violation of the Safety Appliance Act was affirmed on appeal. The Court, in answering the argument that the violation of the Act was not the proximate cause of the plaintiff's injuries for the reason that the movement of the cars had resulted in plaintiff's injury was immediately and proximately caused by a grade in the tracks, said:

> "This argument overlooks the fact that it is the purpose of the coupler to hold the cars of a train together upon a grade as well as upon a level track. This movement of the detached portion of the train, made possible by the breaking of a defective coupler on a grade, was the necessary and natural effect of that cause, clearly within the contemplation of the Federal Safety Appliance Act (Comp. St., Sec. 8605 et seq.) and undoubtedly one of many substantial reasons for its enactment."

And in answer to the contention that Caldwell's act in getting upon the detached part of the train was an intervening cause, the Court (l. c. 947) said:

> "Notwithstanding the result, plaintiff's performance of duty cannot be held to be the proximate

cause of the injury any more than if would have been the proximate cause had he been upon the car at the time the coupler broke and had remained at his post in the performance of service clearly within the scope, and manifestly within the urgent necessity of his employment, until the collision occurred. Any other conclusion would, in effect, place a premium upon faithlessness and disregard of duty."

In **McAllister v. Merchants Bridge Terminal Ry. Co.**, 324 Mo. 1005, 25 S. W. (2d) 791, the action was one under the Employers' Liability Act for the death of McAllister, a switchman, alleged to have been caused by the violation by defendant of the coupler provision of the Safety Appliance Act. McAllister was engaged in lining up switches in defendant's yards so that cars composing a train could be kicked into the various tracks. Due to a defective coupler, two cars broke loose from the train and started rolling down grade following an empty car. In response to a signal by the foreman, McAllister started toward the cars that had broken away in order to check them and prevent damage. The testimony and the inferences to be drawn therefrom warranted the finding that McAllister boarded one of the cars and had set the brake thereon and that the loaded cars overtook the empty car resulting in an impact that caused McAllister to fall between the cars. On the issue of proximate cause, the Court (324 Mo., l. c. 1015, 1016, 25 S. W. 2d, l. c. 796) in part said:

> **"The thread of causal connection runs from the disengagement of these two cars from the train by the defective coupler through the foregoing train of circumstances to the death of William McAllister and is discernible from the evidence."**

And later in the opinion (324 Mo., l. c. 1018, 25 S. W. [2], l. c. 798), in answering the contention of the railroad

company that the breaking of the coupler was not the proximate cause of McAllister's death because such breaking had already taken place before McAllister got upon one of the cars (a contention similar to that here advanced by respondent) the Court said:

> "This is an unsound theory under the facts of this case, and it is not supported by the authorities cited upon that phase of the question. It must be conceded that there was evidence that the breaking of the coupler was the cause of the two cars becoming detached from the rest of the train and moving on the track after the other car. **It is too plain for argument that the cause mentioned continued actively operative, and inhered in the movement of the two cars.**" (Emphasis supplied.)

These cases alone serve, we submit, to definitely refute respondent's contention on this phase of the case. Certainly the question of liability does not depend upon whether a brakeman who is endeavoring to stop a movement of cars caused by a defective coupler actually gets upon a car or is injured while attempting to do so.

II.

The second point in the Brief for Respondent is that "the Court of Appeals properly reversed the judgment below for the reason that the trial judge erroneously instructed the jury that the plaintiff in order to discharge his burden of proving a breach of defendant's duty, need only prove that any such coupler did in fact fail to couple automatically by impact."

This has reference to one short paragraph of the District Court's charge to the jury which respondent picks out, criticizes and undertakes to make the basis for sustaining the opinion of the Court of Appeals which, how-

ever, condemned the charge not merely because of this paragraph but because the charge "contained no explanation of the legal effect of this proof and the permissible use which the jury could make of it, i. e., that from it the jury could infer bad condition of the couplers and consequent violation of defendant's statutory duty and therefore could find this issue for plaintiff on that evidence if the inference arising therefrom was stronger than the proof and inference that the separation resulted from other causes"; the Court adding that "where reliance for the proof of the ultimate fact rests entirely on circumstantial evidence it is ordinarily essential that the effect of the evidence and its proper use be explained."

We believe that we have fully shown in our petition for the writ and former briefs herein that such ruling of the Court of Appeals is erroneous. But the question immediately in hand is whether there is any merit in respondent's contention that the giving of the paragraph of the charge quoted above, regardless of the effect of all other portions of the charge, constituted prejudicial error. We respectfully submit that such contention is devoid of merit.

This particular paragraph of the charge is worded as follows:

> "The plaintiff in order to discharge the burden of proving a breach of defendant's duty is not required to prove the existence of any defect in such coupler but need only prove that any such coupler did in fact fail to couple automatically by impact" (R. 163).

It is obvious that the real purpose of the insertion of such paragraph in the charge was to inform the jury of the fact that **plaintiff in order to recover was not required to prove the existence of any particular defect or defective condition in the coupler**. And there are obvious reasons why the words "but need only prove that any such cou-

pler did in fact fail to couple automatically by impact", could not possibly have misled the jury.

In the first place, the undisputed evidence shows that when two couplers come together if both knuckles are closed they will not couple automatically by impact, but if only one of the knuckles is open the coupling should be made automatically (R. 44); and that upon this occasion Tielker did open the knuckle of the coupler on the east end of the Pennsylvania car (R. 43) so that it was "in good, normal operating condition" (R. 52), and that the Pennsylvania car was kicked down hard enough to have it join onto the cars ahead (R. 45). In the light of that evidence, assuredly no juror could have failed to understand that when the court said that plaintiff "need only prove that any such coupler did in fact fail to couple automatically by impact," such language implied a failure to couple on a fair trial—where at least one knuckle was open, **in which event a failure to couple automatically by impact would suffice to establish a violation of the Act.**

And when this criticized paragraph of the charge is considered in connection with the other portions of the chagge preceding and following it, that is, **when the charge is considered as a whole**, the fallacy of respondent's argument in this connection readily appears. Prior to this criticized paragraph, the District Court in its charge, after referring to the respective positions of the parties, said:

> "Now, that, as I understand it, states the respective positions of the parties. So the case resolves itself down to a very simple issue: a decision on two questions by you:
>
> "Did the defendant use cars in interstate commerce on the occasion in question that were not equipped with couplers that coupled automatically on impact, first?

"Second, if the defendant violated the statute in the respect I have just referred to, was such violation the proximate cause of the plaintiff's injury?"

It will be observed that the Court thus very clearly stated **the ultimate issues of fact in the case.** And the Court then properly charged:

"Under the law as I have referred to, in this case the defendant had an absolute and continuing duty not to haul or use on its lines any car not equipped with couplers coupling automatically on impact. And it was not only the duty of the defendant to provide such couplers, but it was under the further duty to keep them in such operative condition that they would always perform their function."

Then follows the criticized paragraph of the charge quoted above. And immediately following this the Court charged:

"Now, I charge you in this case that if you find and believe from the evidence that at the time and place mentioned in evidence, defendant was hauling or using on its lines one or more cars equipped with couplers which did not couple automatically on impact, and that by reason thereof a separation occurred between the Pennsylvania hopper car and the Rock Island box car, and that said separation was due to a failure on the part of the couplers of either car to function properly and to couple automatically on impact, then in that (even) you are instructed that the defendant violated the Safety Appliance Act that I have referred to.

"And if you further find and believe from the evidence that such violation, if any, directly and proximately caused, either in whole or in part, plaintiff's injuries and damages, if any he sustained, as referred to in the evidence, then your verdict will be in favor of the plaintiff and against the defendant in this case.

"On the other hand, if you should find and believe from the evidence that the separation of the cars, that is, the Pennsylvania car and the Rock Island car, was due to some other cause, that a failure to provide couplers coupling automatically on impact did not cause it, or that the separation of the cars, regardless of its cause, was not the proximate cause of plaintiff's injuries, then your verdict in this case should be for the defendant."

A little later on in the charge the trial court, in order to make crystal clear what were the ultimate issues of fact to be resolved by the jury, further said:

"Now, I reiterate the plaintiff charges the defendant with liability in this case based upon the violation of a federal statute, namely, a statute which requires and places the duty upon the defendant that it shall not haul or use cars that are not equipped with couplers that couple automatically on impact. The defendant denies the charge of the plaintiff in this respect.

"The plaintiff also charges that the proximate cause of the injuries sustained by him was due to the failure of the defendant to comply with the statute which I have just called to your attention. The defendant denies that, regardless of whether it did or did not violate the statute, that the injuries sustained by the plaintiff were (due to) the proximate cause of the failure of the cars to couple automatically on impact.

"Now, the burden of proof rests upon the plaintiff to sustain the charge he has made in this case by a preponderance of the evidence that is, by a greater weight of the evidence; that is, these two propositions: that either the Pennsylvania or the Rock Island car referred to in evidence were not equipped with cou-

plers coupling automatically on impact, as required by law, and that the plaintiff's injuries were directly and proximately caused by reason of such failure to equip said cars, or either of them, with the couplers coupling automatically on impact."

It will be seen that the trial court by its charge not only made it clear that the question of liability depended on whether respondent failed to equip its car or cars with couplers automatically by impact, as the Court of Appeals held (New York, Chicago & St. Louis R. Co. v. Affolder, 174 F. 2d 486, l. c. 491), but also made it clear that that question was one to be resolved by the jury.

On page 19 of respondent's said brief it is said that the courts hold that proof of failure to couple upon a fair trial authorizes a permissive inference of equipment with one or more inefficient couplers, but that this inference must be made by the jury, that it cannot be crammed down their throats by the court. The answer to this is twofold: First, "proof of failure to couple on a fair trial" constitutes more than mere circumstantial evidence of a violation of the coupler provision of the Safety Appliance Act; it constitutes direct proof that the carrier is then and there hauling on its line a car not equipped with couplers coupling automatically by impact as the Act requires; and, second, in this case the charge unmistakably shows that the court did not undertake to compel the jury to make any finding of fact, but submitted to the jury the issues of the violation of the statute and that of proximate cause, submitting the former in the language of the statute, and told the jury that the burden was upon petitioner to prove by the preponderance or greater weight of the evidence that the statute was violated, and that such violation proximately caused petitioner's injuries (R. 165).

None of the authorities referred to by respondent in this connection in its latest brief have to do with a situation

such as is presented by this record. Some of these cases were cited by respondent in its "Suggestions and brief in opposition to the granting of the petition for writ of certiorari," and were briefly discussed in petitioner's reply brief filed prior to the issuance of the writ. We shall here advert to but two of the cases newly cited by respondent in its latest brief, namely, Chestnut v. L. & A. R. Co., 335 Ill. App. 254, 81 N. E. 2d 600, and O'Donnell v. Elgin J. & E. R. Co. (7 Cir.), 161 F. 2d 983. Respondent features these cases on pages 25-27 of its brief, but we submit that neither of them here aids respondent's cause.

In the Chestnut case, after Count I of the complaint, charging a violation of the Federal Safety Appliance Act had been withdrawn by the plaintiff, leaving only Count II, which charged negligence under the Employers' Liability Act (81 N. E. 2d, l. c. 661), the trial court directed a verdict for the plaintiff leaving it to the jury to determine only the amount of the damages. The language quoted by respondent from the opinion had to do with that situation, one wholly unlike the situation here involved, and is consequently here without influence.

In the O'Donnell case the plaintiff, suing for the death of her husband, charged general negligence under the Federal Employers' Liability Act and also a violation of the coupler provision of the Safety Appliance Act. The violation of the Safety Appliance Act was predicated upon the **breaking of a coupler** during a switching operation. The language quoted by respondent from the majority opinion, as well as that quoted from the dissenting opinion of Judge Minton (now Mr. Justice Minton of this Court), had reference to that state of facts. It is without application in a case such as this where the proof shows a failure of cars to couple automatically by impact on a fair trial.

III.

Respondent's assignment of error in the Court of Appeals that the verdict was so excessive that the trial court, in reducing it by remittitur from $95,000.00 to $80,000.00 instead of awarding a new trial, was guilty of a abuse of discretion, presented nothing for review by the Court of Appeals as that court held.

The question of the amount of the damages to be awarded was one of fact for the jury, subject to the supervision of the trial court. And the rule that this Court will not review the action of a Federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long line of decisions of this Court, among which are: Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 77 L. Ed. 439; City of Lincoln v. Power, 151 U. S. 436, 38 L. Ed. 224; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, l. c. 75, 36 L. Ed. 71; Aetna Life Insurance Co. v. Ward, 140 U. S. 76, 35 L. Ed. 371. The rule likewise precludes a review of such action by a United States Court of Appeals. Fairmount Glass Works v. Cub Fork Coal Co., supra, 287 U. S. 474, l. c. 481, 77 L. Ed. 439, l. c. 443.

The rule, of course, operates to prevent review by a Court of Appeals of the question of the alleged excessiveness of a verdict in a tort action. And the Court of Appeals was right in holding in this case that the assignment of error that the verdict was excessive was not properly addressed to that Court (R. 214, 174 F. [2d] 486, l. c. 493). In **Public Utilities Corporation of Arkansas v. McNaughton** (8 Cir.), 39 F. (2d) 7, l. c. 8, 9, the Court said:

> "Neither can the question as to the amount of the verdict be considered by this court. In the case of Sun Oil Co. v. Rhodes (C. C. A.), 15 F. 2d 790, 792, Judge Stone said in reference to a similar complaint: 'The

fifth point challenges the amount of the verdict. Such matter cannot be questioned in this court.'

"The reason for this rule is well stated in New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, [illegible]it. 75, 12 S. C. 356, 36 L. Ed. 71, where the court said: 'Whether the verdict was excessive is not our province to determine. * * *' The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here. As stated by us in Aetna Life Insurance Co. v. Ward (140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371): 'It may be that, if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province.'"

Nor does the record support the charge of abuse of discretion.

At the time of his injury petitioner was a young man 35 years of age, earning approximately $400.00 per month (R. 20). His right leg was mangled, necessitating amputation, and leaving a stump of but four inches in length (R. 29, 61). The damage done to the stump as a whole left a very painful condition (R. 61). Dr. Simon testified that petitioner could not put on an artificial limb in the condition of his leg at the time of the trial; that there would have to be further surgery, shortening the bone, and, among other things, "a lot of undermining and release of a great deal of scar tissue" (R. 62); that if any appliance could be used it would have to be a "sort of table arrangement" in which "no weight bearing can be expected of the stump itself"; and that it would not be comfortable and would require considerable exertion to lug it around (R. 63). Petitioner testified that there seemed to be a constant weight moving in this stump, that he seemed to be sitting on the back of his heels, suffers with it all the time,

more at night than in the daytime, and that when he tries to sleep the stump kicks up in the air and he has to sit up and cannot rest; that it keeps on his nerves all the time (R. 29). And Dr. Simon testified that "there is a great deal of mental shock and anguish accompanying a situation of that kind that requires treatment for a long, long time," and that in his opinion petitioner will continue to suffer pain and symptoms of this type in the future (R. 64).

The trial court's thorough consideration of this matter in its opinion covers more than three pages of the record (R. 181-184, 79 F. 2d, l. c. 368-370). The Court, assuming that plaintiff had lost only about 60 per cent of his earning capacity, properly found that the present value of such future loss of earnings, plus earnings lost prior to the trial, aggregated at least $70,000.00, and, after referring to a number of authorities, held that $80,000.00 would be fair compensation to petitioner for such loss of earnings, past and future, and to "reasonably compensate him for past and future pain and suffering and loss of leg, as a matter of disfigurement, embarrassment and inconvenience," taking into consideration the decreased purchasing power of money due to the change that has come about in economic conditions (R. 183, 184, 79 F. Supp. 369, 370).

We submit that the record plainly refutes the charge that Judge Hulen abused his discretion in regard to this matter.

Petitioner again prays that the judgment herein of the Court of Appeals be reversed and that the judgment of the District Court be affirmed.

Respectfully submitted,

MARK D. EAGLETON,
WILLIAM H. ALLEN,
Attorneys for Petitioner.